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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 139

ALVARO ALCORTA,
Petitioner

vs.

THE STATE OF TEXAS

BRIEF FOR PETITIONER

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I. Opinions

1. Ex Parte *Alvaro Alcorta*—Order denying writ of habeas corpus, dated March 13, 1957, by the Court of Criminal Appeals of Texas:

> "The application for the writ of habeas Corpus was set for hearing because of the allegation therein that petitioner's conviction was void because deliberate perjury was committed upon the trial by an important state's witness and members of state's counsel were aware of such perjury and encouraged the witness to so testify, and the further allegation that a hearing was held before District Judge Onion, of the Criminal District Court No. 2 of Bexar County, on February 21, 1957, at which time the facts touching the above allegation were developed.
>
> "We ordered the facts which were developed at that hearing forwarded to this court.

"The record of said hearing is before us and it does not support petitioner's allegation, nor is it shown therein that the conviction is void, as alleged.

"The conviction not being void, this court is without jurisdiction to issue the writ of habeas corpus.

"The application for the writ of habeas corpus is denied.

"In chambers, this the 13th day of March, 1957.

Lloyd W. Davidson, Judge
K. K. Woodley, Judge"

2. Ex Parte *Alvaro Alcorta*—Concurring opinion dated March 13, 1957, denying writ of habeas corpus by the Court of Criminal Appeals of Texas:

"I agree that the conviction is not void but feel that petitioner's contention should be stated and discussed.

"Petitioner had been separated from his wife for ten months prior to the homicide.

"The witness Castilleja told Assistant District Attorney Barrera prior to the trial that he had five or six acts of intercourse with petitioner's wife after her separation from the petitioner and prior to the night of the homicide. Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked.

"Barrera called Castilleja as a witness for the State, and, on direct examination, the following transpired:

"Q. Natividad (Castilleja), were you in love with Herlinda (petitioner's wife)?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes."

"It was not shown that any of the answers were untrue.

"Petitioner's contention is that, since Barrera knew about the acts of intercourse at the time he called Castilleja to testify, the questions propounded to him on direct examination as set forth above, together with Barrera's admonition to Castilleja not to volunteer any information while a witness unless specifically asked, were tantamount to the suppression of evidence, that Castilleja's testimony at the trial was perjury, all of which deprived the appellant of a trial in accordance with the rules of due process.

"Though not without difficulty, the writer has concluded that petitioner's contention cannot be sustained.

Morrison, Presiding Judge."

II. Jurisdiction

The jurisdiction of this Court is invoked under the 5th and 14th Amendments to the Constitution of the United States.

The decision sought to be reviewed is a denial by the Court of Criminal Appeals of Texas on March 13, 1957, of an application for a writ of habeas corpus, said application alleging that the conviction, verdict, sentence, and judgment, and a warrant for the execution of the death penalty in Cause No. S-54370, in Criminal District Court No. 2 of Bexar County, Texas, styled *The State of Texas* v. *Alvaro Alcorta*, are void and should be set aside and held for

naught because all the same was based on perjured testimony against Alvaro Alcorta, and the suppression of evidence in favor of Alvaro Alcorta, which evidence in both instances was vital and material to the issues of guilt and/or the punishment to be assessed by the jury.

That this cause involves a federal question raised in the state court by the filing of an application for a writ of habeas corpus after conviction, as provided under Article 119, Code of Criminal Procedure of Texas, in which your petitioner claimed that he was denied due process of law because of the perjury and suppression of evidence, as hereinabove alleged.

Statutes Involved:

Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or Naval forces, or in the Militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV, Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1256, Penal Code of the State of Texas:

"Murder. Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing."

Article 1257, Penal Code of the State of Texas:

"Punishment for Murder. The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two."

Article 1257a, Penal Code of the State of Texas:

"Evidence. In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed five years, the defendant shall have the benefits of the suspended sentence act."

Article 1257b, Penal Code of the State of Texas:

"Instructions. In all cases tried under the provisions of this Act, it shall be the duty of the court to define 'malice aforethought' and shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years; . . ."

Article 1257c, Penal Code of the State of Texas:

"Instructions on issue of murder without malice. In all cases tried under the provisions of this Act it shall be the duty of the Court, where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, . . ."

III. Questions Presented

Have the provisions of the 5th and 14th Amendments to the Constitution of the United States been violated, or has an accused been accorded a fair and impartial trial where:

a. The prosecutor advised and encouraged the only eye witness to the killing, who was also the state's main witness, to deny and not to admit nor volunteer facts favorable to the defendant which would have mitigated the punishment assessed by the jury?

b. The witness, after having received the foregoing advice from the prosecutor, committed perjury regarding matters vital and material to the issues of guilt and/or punishment to be assessed?

c. The prosecutor, before the trial had begun, received information vital and material to the issues of guilt and/or punishment, favorable to the defendant but unknown to the defendant at the time, and failed and refused to apprise the court, the defendant or his attorney of the same so that such evidence would not be available to the defendant, but instead, having advised the witness to deny such facts, the prosecutor proceeded to question the witness during the trial regarding these facts and, receiving answers known to him (the prosecutor) to be untrue, he sat mute and neither informed the court nor the defendant that the testimony of the witness was false, untrue, and perjured?

IV. Statement of the Case

On or about June 19, 1955, Alvaro Alcorta, a citizen of the State of Texas and of the United States of America, stabbed his wife, Herlinda Alcorta, to death shortly after he found her sitting in an automobile with one Natividad Castilleja at about 2:00 o'clock in the morning, in front of or near the home of her parents, where she was residing at the time.

On July 28, 1955, Alvaro Alcorta was indicted by a Bexar County, Texas, Grand Jury for the offense of Murder with Malice, said indictment being based on the killing of his wife, as above described.

On October 3, 1955, the defendant was tried in the Criminal District Court No. 2, of Bexar County, Texas, for the

aforementioned offense after entering a plea of "not guilty."

During the trial, a witness, Natividad Castilleja, who was seated in the car with the deceased immediately before she was stabbed to death, was called to the witness stand by the State of Texas and testified as follows regarding his relationship with the deceased (R. 142):

"Q. She's married. Now, other than the time you saw or met Herlinda Alcorta at your sister's house, did you ever see her on other occasions?

A. Well, I give her about two times, I give her a ride.

Q. You gave her a ride about two times?

A. Yes, sir.

Q. From where to where?

A. From where she was working to her house."

And again the following questions asked by the same assistant district attorney and the answers given by the witness Castilleja while still on direct examination by the State (R. 156):

"Q. Natividad, were you in love with Herlinda?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes."

After the State had rested its case, the defendant took the witness stand and testified that he and his wife had

been separated for some time; that she had neglected her children and had on many occasions left them alone and unattended while she was out with other men; that he had seen her at several night clubs dancing with men; that he had seen her on various occasions in automobiles with men; that he had seen her on several occasions at night clubs dancing with the witness, Natividad Castilleja; that just before the stabbing he saw her sitting in an automobile with Castilleja, kissing and embracing him; that all of these things so inflamed his mind and enraged him to the extent that he could not control his emotions and thereupon stabbed his wife many times with a pocket knife.

On November 5, 1955, the jury returned a verdict of guilty of the offense of Murder with Malice and assessed the death penalty as punishment.

On November 8, 1955, a motion for a new trial was filed in the trial court.

On November 12, 1955, said motion for a new trial was denied and notice of appeal to the Court of Criminal Appeals of Texas was given on that date.

On December 21, 1955, said appeal was filed in the Court of Criminal Appeals of Texas and was submitted on brief and argument on February 15, 1956.

On May 30, 1956, the judgment of the trial court was affirmed by the Court of Criminal Appeals of Texas.

On June 20, 1956, appellant's motion for a rehearing was argued and the same was overruled on October 3, 1956.

On October 17, 1956, a second motion for rehearing was submitted and the same was denied without written opinion on October 24, 1956.

On January 16, 1957, a hearing was had before the Board of Pardons and Paroles of Texas in an attempt to commute

from death in the electric chair to life imprisonment, and the same was denied on January 17, 1957.

On January 24, 1957, one Father Francis Duffy, a Catholic priest, Chaplain at the Texas State Prison at Huntsville, Texas, went to the home of Natividad Castilleja in San Antonio, Texas, and interviewed him regarding his testimony in the trial. Shortly thereafter, Father Duffy obtained from the witness a sworn affidavit to the effect that he, Castilleja, had not told the truth when he testified in the trial of Alvaro Aleorta. Further, Castilleja stated in the affidavit that he had been intimate with the deceased on many occasions; that he had given the prosecutor this information before the trial of the case, and was instructed and advised by the prosecutor not to admit nor volunteer this information, but to deny the same if he were asked. Further, that the reason he did not tell the truth in the trial regarding his relationship with the deceased was because of the instruction and advice given him by the prosecutor and, had it not been for this instruction and advice, he would have admitted his true relationship with the deceased.

On February 8, 1957, a subsequent hearing for commutation was had before the Board of Pardons and Paroles of Texas and the foregoing facts were presented to the Board, including the affidavit of Castilleja as aforementioned. The District Attorney of Bexar County, Texas, and his assistant, the prosecutor who tried the case, were present at this hearing and both admitted that they had been informed before the trial of the case by Natividad Castilleja of his true relationship with the deceased. The prosecutor who tried the case made the following statement, under oath, before the Board of Pardons and Paroles:

> "I told him (Castilleja) that he didn't have to tell it to the jury; yes, I told him it was not admissible unless

it was brought up as a defense. It had not been raised as a defense and, if it had been asked, I would have objected to it."

On February 8, 1957, the Board of Pardons and Paroles again refused to commute the sentence from death in the electric chair to life imprisonment.

On February 14, 1957, an application for a writ of habeas corpus was filed in the trial court, under Article 119, Code of Criminal Procedure of the State of Texas, wherein the above and foregoing facts regarding the suppression of evidence and perjury were set out, and it was alleged that the conviction, verdict, sentence and judgment were void for the reason that the defendant was denied rights guaranteed him under the 5th and 14th Amendments of the Constitution of the United States. A hearing was had on the above mentioned application for a writ of habeas corpus on February 21, 1957, in the Criminal District Court No. 2 of Bexar County, Texas. Evidence was heard and a Statement of Facts was compiled, and the application for the writ of habeas corpus was denied.

On February 22, 1957, an application for a writ of habeas corpus was filed in the Court of Criminal Appeals of Texas and a request was made that the court reporter of the Criminal District Court No. 2, Bexar County, Texas, be instructed to prepare a narration of the facts adduced in evidence in the hearing in that court, and that the same be transmitted to the Court of Criminal Appeals for its consideration. Said request for a narration of the facts was granted, and the same was prepared and transmitted to the Court of Criminal Appeals.

On March 6, 1957, a hearing was had before the Court of Criminal Appeals of Texas, in Cause No. 316—Application Docket, on the aforementioned application for writ of habeas corpus and arguments were heard by the court. On

March 13, 1957, the Court of Criminal Appeals of Texas entered an order denying the application for a writ of habeas corpus.

On March 18, 1957, a motion for rehearing was requested and it was subsequently denied by the Court of Criminal Appeals of Texas.

On April 5, 1957, a final plea for commutation of sentence was filed with the Board of Pardons and Paroles of Texas, and the same was overruled on the same date. Also, on the same date, the Board of Pardons and Paroles granted petitioner a stay of execution until June 4, 1957, in order to afford petitioner time to prepare and file a petition for writ of certiorari in the Supreme Court of the United States.

On May 27, 1957, this Honorable Court granted the writ of certiorari and ordered a stay of execution for petitioner.

V. ARGUMENT

Petitioner Is Being Deprived of His Life Without Due Process of Law in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is contended that under Article 1257a, Penal Code of the State of Texas, petitioner had the right during his trial to relate to the jury all relevant facts and circumstances within his knowledge regarding the conduct of his deceased wife, in order to show the condition of his mind at the time of the homicide. Since he had this right under the said Article 1257a, it must be stated that he then had the further right to corrobbrate his own testimony regarding his condition of mind at the time of the homicide by any other witness who knew those facts to be true and was competent to testify regarding the same. Certainly he was entitled

to the benefit of the true and unperjured testimony of the witness, Natividad Castilleja, who, had he told the truth when he testified, would have more than corroborated petitioner in the testimony he gave when he took the witness stand in his own behalf. In support of this contention, petitioner cites the case of *Thompson* v. *The State of Texas*, 29 SW (2d) 343, and quotes the following statement of the court in that case:

> "That it was calculated to stir the passions of a father under the fact shown in this record is hardly open to controversy . . . If so he had the right to prove in every legitimate way the truth of the matters relied upon by him in mitigation of the punishment, and we think, under the issues present in this record, he was entitled to corroborate Hemphill by the testimony of Mrs. Buckly . . . and its exclusion was error."

It must be stated that the prosecutor, by his conduct in telling Castilleja to deny his true relationship with the deceased, deprived the petitioner of his legal right to corroborate his own testimony regarding his condition of mind at the time of the homicide. Whether the same was done wilfully or whether it was due to an honest mistake on the part of the prosecutor is of no consequence insofar as the effect it had on the jury and the verdict and punishment assessed by the jury. To say that this conduct and its effect did not seriously damage the petitioner is inconceivable. It should be observed that the damage was two-fold: First, it deprived the petitioner of his right to corroborate his own testimony and bolster his credibility as a witness in the eyes of the jury and, secondly, it cast serious doubt as to the truth of all his testimony.

The prosecutor seeks to excuse his conduct in advising the witness to deny his true relationship with the deceased on the theory that such testimony was not admissible unless

raised as a defense by the petitioner. The prosecutor, however, has overlooked the fact that it is the duty of the court and not the prosecution to pass on the admissibility of evidence. It must be observed at this point that little sincerity can be attributed to this excuse by the prosecutor for his conduct since the State had not rested its case at this point and the defendant had not yet testified, and the prosecutor had no right to assume at this stage of the trial what petitioner's defense might be. Assuming, only for the sake of arguiment, that the prosecutor's contention is correct and that such testimony was only admissible if raised by petitioner as a defense, then it is impossible to attribute any sincerity whatsoever to the prosecutor's contention in view of the fact that he, the prosecutor, raised the issue regarding Castilleja's relationship with the deceased before the State had rested, before the petitioner had testified, and before any defense whatsoever had been raised.

Only one conclusion can be arrived at in the light of the foregoing, and that is that the prosecutor, anticipating such testimony on the part of the petitioner, if and when he did testify, sought to weaken and discredit such testimony before it was ever given by the petitioner.

It is admitted that the direct question, "Did you ever have sexual intercourse with the wife of Alvaro Alcorta?" was never asked Castilleja by the prosecutor but to say that this question was not asked even more emphatically by the prosecutor is unthinkable in the light of the following testimony of Castilleja (R. 142):

"Questions by Mr. Barrera:

Q. She's married. Now, other than the time that you saw or met Herlinda at your sister's house, did you ever see her on other occasions?

A. Well, I gave her about two times, I give her a ride.

Q. You gave her a ride about two times?

A. Yes, sir.

Q. From where to where?

A. From where she was working to her house."

And, again, the following questions asked by the same assistant district attorney and the answers given by Castilleja while still on direct examination by the State (R. 156):

"Q. Natividad, were you in love with Herlinda?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes."

The foregoing testimony of Castilleja, when compared with his subsequent testimony in the hearing on petitioner's application for a writ of habeas corpus, after conviction, wherein he testified that he had on many occasions indulged in acts of sexual intercourse with the deceased, is contradictory and shows glaringly the injustice and damage done to the petitioner at the time he was tried. Castilleja testified at the aforesaid hearing as follows (R. 26, 27):

"Questions by Mr. Semaan:

Q. All right. Now, Natividad, why didn't you say in court, in the trial of Alvaro Alcorta, why didn't you tell about these acts of intercourse you had with her?

A. Why didn't I say it? Well, I wasn't asked.

Q. Is that your only reason?

A. Well, yes, because they told me not to volunteer. I wasn't going to volunteer anything they didn't ask me.

. . . . . .

Q. Had you not been told by Roy Barrera or Pete Torres that when you took the stand and testified against Alvaro Alcorta you did not have to volunteer that information about sexual relations with Herlinda Alcorta, would you have told about it?

A. Yes."

In the light of the prosecutor's testimony in the hearing on petitioner's application for a writ of habeas corpus, it can only be concluded that he maintained utter disregard for the rights of the petitioner during his trial, and cared little whether or not the petitioner was afforded a fair and impartial trial as guaranteed him under the 5th and 14th Amendments to the Constitution of the United States. The following excerpts taken from the testimony of the prosecutor clearly show his indifference, as above stated (R. 74, 75):

"Questions by Mr. Semaan:

Q. Would it not have been the honorable and honest thing to do, Mr. Barrera, if you wanted to see that this man had a fair and impartial trial, when you heard those answers, knowing that the man had had intercourse with her, to notify the Judge as to the true answers or the true facts?

A. Mr. Semaan, the honorable thing is never to approach the bench with the facts of a case, as I have often seen it done, and try to influence a judge one way or the other.

. . . . . .

Q. You never took it upon yourself; in spite of the fact that the occasion never arose, you never felt it was your duty or took it upon yourself to tell the judges about that, either before the trial or after the trial; either before this testimony was elicited or after it was elicited, did you, Mr. Barrera?

A. Not any more so than I felt it was my duty to tell him about the character of the defendant, Alvaro Alcorta, or not more than the misconduct of Alvaro Alcorta, knowing myself it was inadmissible to begin with. It is not out of the ordinary to instruct any witness not to volunteer any information and to answer only the questions asked of him truthfully.

* * * * *

Q. Did you ever take it upon yourself, Mr. Barrera, either before or after the trial, or before this testimony was elicited, this testimony I have just read to you and you have acknowledged, either before it was elicited or after it was elicited, did you ever take it upon yourself to, or feel a duty to inform the attorney for the defendant, Alcorta, of the true facts regarding the relationship between Herlinda Alcorta and Natividad Castilleja?

A. Not any more than I would feel there was a duty upon him to tell me what the defendant may have told him, or the true facts of the killing as it might have occurred as he knows it, no, sir."

The conduct of the assistant district attorney in suppressing vital and material evidence favorable to the petitioner, and his encouraging Castilleja to commit perjury, amounted to fundamental unfairness to the petitioner and violated his constitutional right. In support of this, petitioner cites the case of *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, and quotes the following statement of

Circuit Judge Hastie in his concurring opinion wherein he states:

> "It seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair minded jury. This is notably true of testimony of a police officer, and most certainly of an arresting officer, favorable to a contention of the accused person. Here the prosecutor not only kept quiet about the existence of such testimony but, as Judge McLaughlin points out, even stated in open court that other police officers if called 'would corroborate what already has been testified to.' Thus, the wrong of nondisclosure of obviously significant testimony was compounded by a misleading affirmative statement as to the nature of the available but unused testimony.
>
> "In brief, it is not every case in which the prosecution must reveal the availability of testimony inconsistent with the government's contentions. But in special circumstances such nondisclosure may, and here it certainly does, amount to fundamental unfairness in the trial of a criminal case."

It was the absolute and unequivocal duty of the assistant district attorney to bring the true relationship of the deceased and Castilleja to the attention of the jury. If he himself chose not to do this, it then became his legal and moral duty to apprise the court, the petitioner, or his attorney of this evidence once it was brought to his attention and permit them to use it, if they so desired. It was cer-

tainly not his duty, nor his right, to suppress such evidence and to tell Castilleja to deny it under any circumstances. In support of this contention, your petitioner quotes the following statement from the case of *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815:

> "In his concurring opinion in Commonwealth v. Neill, 362 Pa. 507, 520, 67 A.2d 276, 282, Mr. Chief Justice Maxey said: 'Of course, if he (the District Attorney) should discover some fact which would militate in defendant's favor it would be his moral and legal duty to bring this to the jury's attention * * *' See also Commonwealth v. Sarkis, 164 Pa. Super. 194, 199, 63 A.2d 360, 363, citing inter alia, Donaldson v. Commonwealth, 95 Pa. 21."

In the case of *United States ex rel. Montgomery* v. *Ragen*, 86 F. Supp. 382, District Judge Igoe, in his opinion, defines clearly the rights and duties of a prosecutor, as well as the rights of a defendant, as guaranteed him under the 14th Amendment to the Constitution of the United States. The following excerpts from his opinion may certainly be applied to this case:

> "A prosecutor is supposed to be an impartial representative of public justice. The methods employed by the prosecution at Lake County in 1924 represents as shocking a situation as ever before presented before this court. A society cannot suppress lawlessness by an accused through the means of lawlessness of the prosecution. A society cannot inspire respect for the law by withholding its protection from those accused of crimes. It was and is the prosecuting attorney's duty to assist in giving a fair trial to a defendant. Read v. United States, 8 Cir., 42 F.2d 636; Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. A prosecutor must, to be fair, not only use the evi-

dence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator. There is evidence in the record sufficiently to indicate that circumstantial vital evidence was brought to or available for the prosecution. The prosecution is charged with the knowledge of what was contained in the certificate of findings by Dr. John E. Walter. The respondent conceded the authenticity of the hospital record. Presenting the obverse, another Judge has said—'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.' Hurd v. People, 25 Mich. 405.

"To condone the methods evident in this case, is to invite grave injustice. There is one way to stop a practice that has become altogether too common—and that is to bring it to a conscious level where the public can scrutinize it and take such steps as are necessary to insure a true rendition of justice to all, regardless of race, color or creed.

* * * * *

"The due process clause of the Fourteenth Amendment embraces the requirement that no trial should deprive a defendant of the constitutional safeguards which are of fundamental importance, and a necessary part of a 'fair trial.' The unjustified and illegal pun-

ishment of James Montgomery is a clear demonstration of violence to the American Concept of due process of law.

* * * * *

"Due process, in short, means fair play. Due process of law is that process of impartial law which is binding because it is right. It senses the mistakes of the past and wants to rectify them. It provides men with faith. As stated in People v. Bimbo, 314 Ill. 449, 454, 145 N.E. 651, 653. 'A defendant charged with crime has a right to a fair and impartial trial according to law, and the law does not *provide one method for trying innocent persons and another for trying guilty persons, as all persons charged with crime are presumed to be innocent until they are proven guilty beyond a reasonable doubt according to the established methods of procedure.*' People v. Gardiner, 303 Ill. 204, 135 N.E. 422; People v. Newman, 261 Ill. 11, 103 N.E. 589. The state's attorney is a sworn officer of the court, and it is his official duty to see that the defendant has such fair and impartial trial. While errors are sometimes committed by counsel through eagerness to win a lawsuit, yet there is nothing *in the duty of a state's attorney which requires him to prejudice the right of a defendant to a fair trial in an eagerness to secure a conviction.* People v. Sorrells, 293 Ill. 591, 127 N.E. 651. (Emphasis supplied.)"

The same thought is further expressed in the case of *Mooney* v. *Holohan*, cited in 98 ALR 406, wherein it is stated:

"... if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury by the presentation of

testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of the defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of an administrative officer in the execution of its laws, may constitute state action within the purview of the 14th Amendment. That amendment governs any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers. Carter v. Texas, 177 U.S. 422, 447; 44 L.Ed. 839, 841, 10 Sup. Ct. 687; Rogers v. Alabama, 192 U.S. 226, 231, 48 L.Ed. 417; 24 Sup. Ct. 257; Chicago B & Q Ry. v. Chicago, 166 U.S. 226, 233, 234, 41 L.Ed. 979, 983, 984, 17 Sup. Ct. 581."

That the prosecutor knew of several acts of intercourse between the deceased and Castilleja cannot be denied. That was admitted by the prosecutor himself, who, in the hearing on the application for writ of habeas corpus, in the Criminal District Court No. 2 of Bexar County, Texas, testified as follows (R. 77):

"Questions by Mr. Woods:

Q. Mr. Barrera, going back to the taking of the statement on July 20th, I believe, of 1955——

A. Yes, sir.

Q. —you were present and Mr. Torres was present and Natividad Castilleja was present?

A. That's correct.

Q. Just what did you tell Natividad Castilleja at the time and place?

A. The situation, as I recall, was this: Mr. Torres had been talking to Mr. Castilleja. He had the statement in writing already and asked me to go in there

and look at it before the witness signed it. At that time I went in. I read the statement. I asked Castilleja if the statements contained therein were true. He said yes. I had a conversation with Mr. Torres in private. I asked him whether or not he was asked if there was or was not any intercourse between Natividad and the deceased in this case. He said he wasn't too satisfied about that. We both then went back in and continued to ask him questions about prior acts of intercourse. He finally admitted he had had intercourse with Herlinda Alcorta on several occasions."

That the prosecution intended to suppress this evidence is manifest from the fact that the admission of the illicit relationship to the district attorney by Castilleja was not included in the written statement taken from him (Exhibit "E", R. 124). Had the district attorney intended to be fair with petitioner, and had he intended the jury to hear all the relevant facts and circumstances surrounding the homicide, this admission by Castilleja would have been included in his statement when it was taken by members of the district attorney's office. The fact that the same was omitted shows clearly the intention and attitude of the district attorney even at that stage of the case.

Further evidence that the relationship between Castilleja and the deceased, Herlinda Alcorta, was known to the district attorney is reflected in a letter from Roy R. Barrera, one of the prosecutors in the trial, to the Board of Pardons and Paroles, dated January 29, 1957 (Exhibit "A", R. 114). In said letter Barrera admits that this relationship was known to him and to other members of the district attorney's office before the trial. Accordingly, it is inconceivable how the prosecutor can deny the fact that the petitioner was denied a fair trial and that his rights guaranteed him by the 5th and 14th Amendments to the Constitution of the United States were not violated.

Further evidence that the prosecutor was fully aware that Castilleja was committing perjury when he testified as he did in the trial of the case is reflected in the testimony of Stewart Long, a newspaper reporter assigned to cover the hearing before the Board of Pardons and Paroles of Texas after the conviction. Mr. Long, while testifying in the hearing on the application for a writ of habeas corpus, testified as follows regarding a statement he heard the prosecutor make, under oath, to the Board of Pardons and Paroles of Texas (R. 82, 83):

"Questions by Mr. Semaan:

Q. You are the witness who testified, regarding this hearing at the Board of Pardons and Paroles on February 8th, that it was you who transmitted that story to the San Antonio Light?

A. Yes.

Q. And that you were present when Roy Barrera made the statement before the Board?

A. Yes.

Q. What did you hear Mr. Barrera say?

A. Just what he said, or do you want the question that was asked?

Q. Give us any background you want, but bear in mind I'm speaking of the point where he stood up and said, 'I'll take the blame for that,' or words to that effect.

A. Mr. Green was being questioned about his policies with regard to his investigator's interview with witnesses, and Mr. Barrera stood up and said, 'I was at those interviews between the investigator and Natividad.'—

Q. Castilleja?

A. —'Castilleja, and I'm responsible for the alleged subornation of perjury.' Whereupon, Attorney Garcia

put Mr. Barrera on the stand and asked him the question as to whether he told the witness, Castilleja, that he did not have to testify concerning sexual relations with Mrs. Alcorta, and he said, 'Yes.'

Q. Who said yes?

A. Mr. Barrera said yes, that it was not admissible unless it was raised as a defense, and that had it been raised, he would have objected in the court."

The same testimony, almost word for word, was given by Harry Van Slycke (R. 84-90), who followed Stewart Long on the witness stand in the hearing on the application for a writ of habeas corpus.

In view of all the foregoing, the following conclusions are evident:

1. That the witness, Natividad Castilleja, and the deceased, Herlinda Alcorta, indulged in acts of sexual intercourse on many occasions during a period of two months prior to the homicide.

2. That the witness, Natividad Castilleja, informed the prosecutor and other members of the district attorney's staff of his relationship with the deceased before the case was tried.

3. That the prosecutor had knowledge of the relationship that had existed between the witness, Natividad Castilleja, and the deceased, Herlinda Alcorta, before the trial.

4. That the prosecutor advised and instructed the witness, Natividad Castilleja, before the trial to deny any acts of sexual intercourse with the deceased, Herlinda Alcorta, when he took the witness stand to testify.

5. That during the trial, the witness, Natividad Castilleja, committed perjury when he testified regarding his relationship with the deceased.

6. That the prosecutor who called Natividad Castilleja to the witness stand heard his testimony and, knowing that the same was false, sat mute and neither notified the court nor the defendant's attorney that the testimony of the witness Castilleja was not true.

It may be argued that the evidence suppressed was not vital nor material to any issue, therefore no harm was done the petitioner, and that the conviction should stand. How this can be argued in good conscience is beyond comprehension. There is no question that, because of the suppressed evidence and the perjury committed by Castilleja, the jury was given an untrue and distorted picture of the actual facts in this case. The jury was led to believe that the petitioner, without just cause or provocation, and without any mitigating circumstances, killed and murdered an innocent and well-behaved wife and mother; when, in truth and in fact, the petitioner, in a fit of temper and while becoming so enraged at the sight of his wife in another man's arms, lost control of his emotions and stabbed his wife to death; not an innocent and well-behaved wife and mother but a woman who disregarded her duties and obligation to her husband and children; a woman devoid of all morals, who taunted and harassed her husband by her conduct with other men until he was no longer able to control his emotions (R. 157-189).

That no man should be deprived of his life without due process of law is elemental. No matter how trivial the offense, no man should be convicted and punished unless a full, complete, and honest picture of the entire situation is given the jury. Under no circumstances should a man be deprived of his life or his liberty where evidence which might mitigate his punishment or prove his innocence is wilfully suppressed by the prosecution nor where perjury is encouraged and condoned by the prosecution. This

thought is magnificently expressed by Circuit Judge Edgerton in the case of *Griffin* v. *United States*, 183 F. 2d 990, wherein he states:

> "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314.'
>
> "The order of the District Court is reversed and the case remanded with instructions to grant a new trial.
>
> "Reversed and remanded."

Reference is made to Articles 1256, 1257, 1257a, 1257b and 1257c of the Penal Code of the State of Texas. In the light of the foregoing facts and circumstances of this case, can it not be said that had the jury heard the true facts from Castilleja regarding his relationship with the deceased, they would have found the petitioner guilty of nothing more than "murder without malice," and could not then have assessed petitioner's punishment in the State Prison of Texas for a period of more than five years.

In its brief filed in opposition to the petition for writ of certiorari, Respondent attempts to attach importance to the fact that although Castilleja had sexual intercourse with the deceased on many occasions he did not have intercourse with her on the night of the killing. Petitioner maintains that Castilleja and the deceased did have intercourse just before the homicide and calls this court's attention to Exhibit "B" (R. 119), wherein Castilleja admits that he had sexual relations with the deceased on many occasions and also just before the killing. (See also testimony of Fred A. Semaan, R. 91-97.) From all the facts and circumstances regarding the relationship of Castilleja and the deceased, coupled with his admission as reflected in the aforementioned Exhibit "B", there should be no doubt or question regarding his relationship with the deceased on the night of the killing. However, whether he did or did not have sexual relations with the deceased just before the killing does not in any way alter the fact that evidence favorable to the petitioner was suppressed during his trial and that Castilleja committed perjury at the suggestion of the prosecution.

Also in its aforementioned brief in opposition, Respondent goes to great lengths to leave the impression with this court that the conduct of the deceased wife of the petitioner was not known to him at the time he stabbed her to death; that petitioner not knowing about her relationship with Castilleja, or other men, testimony regarding such relationship between the deceased and Castilleja or other men would not be admissible; and that the suppression of such evidence by the prosecutor was not harmful to the petitioner since it was not admissible evidence in the first place. Respondent seems to ignore completely the fact that, whether such evidence was admissible or not, the matter of the deceased's relationship with Castilleja was first raised by the prosecution before the State of Texas had rested its

...se. An examination of the testimony of Natividad Castilleja at the trial (R. 140-157) will unequivocally show that this matter was first opened by the State of Texas when it called Castilleja to the stand before the State had rested, and before the petitioner had presented any witnesses or uttered one word in his defense of the case.

Further, and even more important, Respondent completely disregards the testimony of the petitioner in the trial of the case when it attempts to lead this court to believe that petitioner was not entitled to the true and unperjured testimony of Castilleja regarding his relationship with the deceased. Respondent in its brief in opposition goes to great lengths to make it appear that this relationship, not being known at the time of the homicide to petitioner, was not admissible in evidence and cites many cases in support of this contention. Petitioner states that this statement by the Respondent is not supported by the testimony adduced in the trial of the case. Such assumption is baseless and is contrary to the testimony of petitioner during the trial. Beyond the shadow of a doubt, the following excerpts from the testimony of petitioner during the trial show clearly that he was aware of his wife's conduct and relationship with the witness Castilleja, and with other men; that he had suspected such relationship for some time before the homicide; and that such suspicions being confirmed by seeing his wife kissing and embracing Castilleja, he lost control of himself and in a rage of uncontrollable passion stabbed his wife to death. Under Texas law this would be "murder without malice" and the punishment would be confinement in the state penitentiary for a period not to exceed five years. Petitioner relies not only on the following excerpts taken from his testimony in the trial but sincerely suggests a close examination of all his testimony during the trial, as well as the testimony of Castilleja during the trial and a comparison of that with the testi-

mony of Castilleja as adduced in the hearing on the application for writ of habeas corpus:

DIRECT EXAMINATION OF DEFENDANT

(R. 160-163)

"Questions by Mr. Lipscomb:

Q. (Mr. Lipscomb continuing:) On this occasion that they have testified about, the last night that you saw your wife, just what happened? When did you first look for your wife on that night?

A. On that night?

Q. Yes.

A. Well, like the testimony was here awhile ago, that they said that I was drinking with them and all that, why, yes, I was drinking with them. I know that Esperanza but I don't know the other girl. I went over there to that restaurant to see my wife at that time and I went over there with this girl because we bought her a present and I wanted to take it to her to the restaurant where she was working; and, at the same time, I wanted to see her and I took the present over there to give it to her. She refuses; all right. *The night before that I have seen her with another man in a car and he was—she was waiting outside of the restaurant there.* This other woman too, the testimony was given, that was given here that she never saw my wife going out with another man at the same place. I saw that with my own eyes one day before that; and that's why I told her, 'How about last night,' . . . From there, I went to see my wife, but I didn't see my wife alone or in the house or getting in from work or anything like that. *She was with another man in a car. Although he was here and saying it was the only time he have seen her, I have seen him several times in the Radio Club danc-*

ing and she was with that same fellow, and not only with that same fellow but with many others that I don't know the names of. That's when I saw her there in that place; and I didn't really have the intentions that, like Mr. Roy Barrera's got in the statement that I have decided to kill her right there. I didn't have those intentions; I only went to the car and this guy started, well, getting mad and all of that. Well, I never did carry a knife either because I had turned my job in, and I was going away. I never did carry a knife myself, I mean in my pocket. I was going, when I turned my job in, to leave because I didn't want nothing to do with her at least.

• • • • •

Q. And when you saw Castilleja in the automobile with your wife, what did he do?

A. Well, ~~he~~ start kicking me for one thing; and my wife was sitting down and they were kissing; I was looking at them from the rear, from the rear window.

Q. Speak slowly so we can understand.

A. *When I was getting to the car, when I turned the corner, I saw my wife was kissing with this fellow here; I didn't know him then. I just saw him dancing at the Radio Club up here. She had so many that I don't remember their names;* I wouldn't be asking for that, I just saw her, that's all. And I saw them, they were kissing; and I thought they were having a date-up or something; she had the door open, yes. But I had a feeling that something else was going to happen then, not only that they were kissing and all of that but something else. If I had had a camera and waited a little longer, it would have been a different story than what they claim up here.

Q. Well, when Castilleja was in the car with your

wife and you had a knife in your hand, did Castilleja start in your direction?

A. Yes, sir, he started kicking and, well, that was before. When I got to the car, he started the car; my wife said something to him that I heard like, 'My husband is coming.' She knew it; she didn't saw me or anything like that but she heard me while I was walking on the gravel. I had those thick-soled shoes and, when I was walking in the gravel, she knew that it was me. I was getting near the car.

Q. What did Castilleja do when he saw you?

A. When he got in the car, why, I was getting near to the car and she was going to close the door and he started the car; but I hold the door and jump on the running board. That's when the car started zig-zagging. Well, I was trying to get ahold of it myself [illegible] at the same time, stab my wife. I stab her I don't know how many times, I was so mad.

• • • • •

Q. What did he do then?

A. Well, I ran after Castilleja and he took off; and, then, I ran back and jump over my wife and took the wheel and took off (snapping fingers), although I didn't know where I was going or what I was going to do. If I would have been in my senses, I would have turned myself in right there, but I didn't know what I was doing.

CROSS-EXAMINATION

(R. 168)

Questions by Mr. Barrera:

Q. Well, you said you wanted to turn yourself in and that's why you came back to town. I just wanted to

know if the San Antonio Police Department or the Sheriff's office was out towards Boerne.

A. I didn't say I wanted to turn myself in; I said I came back to be punished.

Q. Well, who did you expect was going to punish you?

A. According to the law.

Q. And you expect to be punished, don't you?

A. Sure I am.

Q. You have done very wrong, haven't you?

A. Sure I have.

Q. And you should be punished?

A. Sure.

Q. And you know that?

A. I don't have no witnesses here or nothing and they don't let them talk or anything. Why can't I get a witness up here in my behalf? It is even in the Constitution of the United States that I be defended that way.

Q. Alvaro, what other witnesses were there when you stabbed your wife to death?

A. They only talk a few words and that is all there is to it.

Q. What other witnesses were there when you stabbed your wife?

A. Other witnesses?

Q. Yes.

A. There was only the driver of the car.

Q. Well, he was here, wasn't he?

A. Who, the guy that was driving?

Q. Castilleja?

A. Yes.

Q. He was here?

A. Yes he was here.

Q. Now, you spoke about your wife and your troubles and your intentions to Esperanza Huron, didn't you?

A. Yes, but they are all lies; you advise them before they came here in court.

• • • • •

(R. 170-171)

Q. Now, Alvaro, with reference to your confession here, isn't it a fact that, after you read it, Alvaro, you made any number of corrections on this statement?

A. Well, you told me to put some signatures there, but I don't know what they mean or what they put them for; you told me to put some corrections there, my initials; you told me that, I remember that.

Q. You remember I told you——

A. I don't know what the meaning of the words was that was going there; I don't know what you figure it out.

Q. You don't understand English?

A. Yes, I do.

Q. Do you read English?

A. Maybe you made a mistake on a number of things there.

Q. I did make a mistake every once in awhile and you corrected it?

A. Or maybe it wasn't the way you wanted it.

Q. You corrected it and you put your initials by the corrections, didn't you?

A. Yes; that's the only truth you said when you read it to the jury, that's the only piece of truth you said when I signed my statement there. The rest is nothing but a frame-up, that's all it is.

• • • • •

(R. 174)

Q. Did you intend to stab her, Alvaro?

A. Yes, I did; yes.

Q. Any number of times you intended to stab her and stab her and stab her?

A. I stab her; I mean I was just all carried away when I saw her with that guy and all of that. I was drunk; you get a man like that to think of everything like that, you get carried away and mad.

Q. Tell the jury. You didn't see your wife kissing that man, did you?

A. I did saw her, in the front there. You know what, why I came back?

Q. Alvaro, did you tell me that at any time during the time that we all talked to you? When Mr. Torres was taking that confession, did you tell anybody that?

A. What?

Q. That you saw your wife kissing Castilleja.

A. No; you weren't going to put it in there.

Q. Did you tell us that?

A. No, I didn't told you; you didn't ask me, and I knew if I tell you, why, you won't put it there anyway.

. . . . . .

(R. 177, 178)

Q. And isn't it a fact that you made corrections where you wanted to make corrections and initialed the corrections?

A. You didn't ask me to make any corrections; you could erase them back; part of them you had it in shorthand.

Q. Who put these initials on these pages?

A. Well, I did.

Q. Were those corrections you made?

A. (No response.)

Q. Isn't that right?

A. No.

Q. They were not?

A. I put my name there and I read it; but, you see,

I was only thinking about one-fourth of every page is what I was thinking about. I wasn't in my senses.

Q. You weren't in your senses?

A. No.

Q. Now, you did take the officers out to all of these places that you had been to, isn't that right?

A. What?

Q. You did take the officers out to all of these places that you had been to, where you threw your wife down by the creek?

A. Well, I told them I didn't even know; you showed me.

Q. Did you see the——

A. I didn't know where I threw her or anything; you show me the way.

Q. Did you see the bloody handprint you left there on the creek abutment? Did you see that?

A. What, the bloody hand?

Q. Yes.

A. That mark, well, I probably done it; I ain't denying it.

Q. I see. Well, then, that is true?

A. You told me which way I went when I left the car.

Q. This is true that——

A. You was the one that showed me that.

• • • • •

Q. You also said: 'I know that I have done wrong, and I must be punished for it and no one has said anything to me about punishment. I killed my wife because I wanted to and——'

A. No.

Q. '—I have here confessed to the killing.' Did you tell me that, Alvaro?

A. Not that I wanted to kill her; I had no idea she was with a man over there. I just wanted to see my

kids because I had turned in my job and I was going to take off. That's all I wanted.

. . . . . .

(R. 180)

Q. And where were you going, Alvaro?

A. Well, I just wanted to leave town, that's all.

Q. Where were you going?

A. Just north, any place.

Q. North or south?

A. I didn't want no part of it, just like it happened.

Q. And, at the time this happened, it is a fact that you already had your suitcase in a saloon down here packed?

A. Yes, I had my suitcase packed, but I wanted to see my kids before leaving. Instead of seeing my kids, I saw my wife kissing another man.

Q. At 1 o'clock in the morning?

A. At 1 o'clock; she was in the car with that man, kissing in the car. I caught her with a man and everything.

. . . . . .

(R. 184)

Q. I know. Well, that's why you killed your wife, isn't it?

A. Like I told you, if I had had a camera and waited a little longer, it would have been a different story; I would have brought the picture and showed it to you.

. . . . . .

(R. 186, 187)

Q. Isn't it a fact that Dominga told you, 'You had better not do anything to your wife; if she doesn't love you or you don't love her, you had better leave her alone'?

A. Well, no.

Q. She told you that, didn't she?

A. Not to me, Dominga.

Q. Not to you. Who did she tell it to?

A. I didn't tell it to nobody; that is something that is just made up, that's all. How come, when they come here, they say about going to Mexico and all of that stuff? I never said a word about that.

Q. You mean Dominga made it up?

A. You did; you got everything framed up here, that's all.

Q. And did Esperanza make her testimony up?

A. Well, her testimony, part of it is right and part of it is just a lie, that's all.

REDIRECT EXAMINATION

(R. 188)

Questions by Mr. Lipscomb:

Q. I didn't understand about Castilleja and your wife. Was she kissing him or he was kissing her that last time you saw them together?

A. Well, I don't know exactly which way it was; but they were kissing, that's all. I saw them through the shade of the light from when a car was coming on the opposite direction.

Q. You saw them kissing in the car?

A. Yes, sir."

Respondent attempts to make great issue regarding the testimony of Castilleja in the hearing on the application for a writ of habeas corpus, and in several places in the brief filed in opposition to the petition for writ of certiorari alleges that Castilleja repudiated his statement regarding his relationship with the deceased. Petitioner would show that such is not true and nowhere in the

Statement of Facts in the hearing on the application for writ of habeas corpus is there grounds for such a statement. Petitioner again invites a close inspection of the Statement of Facts in the application for a writ of habeas corpus and is willing to rest his whole case on this Court's interpretation of those facts. Assuming, only for the sake of argument, but absolutely not admitting that the witness Castilleja repudiated his testimony regarding his conduct with the deceased, petitioner says that the testimony of the prosecutor, Roy Barrera, alone is sufficient to prove perjury, subornation of perjury, and the suppression of evidence. In support of this, petitioner makes reference to the testimony of Roy Barrera when he was called to the stand in the hearing on the application for a writ of habeas corpus, both on direct and cross-examination (R. 71-82). Further, reference is made to the testimony of Stewart Long in the hearing on the application for writ of habeas corpus (R. 82, 83), wherein he recites a statement he heard made under oath by Roy Barrera before the Board of Pardons and Paroles of Texas. Petitioner contends that this testimony alone without one word from the witness Castilleja is proof beyond the shadow of a doubt of perjury, subornation of perjury, and the suppression of evidence.

Throughout Respondent's brief it is stated that Castilleja, in the hearing on the application for writ of habeas corpus, testified that he had not committed perjury. Petitioner says that this is a mere opinion of the witness, not supported by the facts, and again invites a reading of his testimony both in the trial (R. 140-157) and in the hearing on the application for writ of habeas corpus (R. 1-71). A comparison of his testimony in these two hearings can lead to only one logical conclusion, and that is that the witness Castilleja either lied during the trial or in the hearing on the application for a writ of habeas corpus. He could not possibly have been telling the truth in both instances.

Respondent, throughout his brief in opposition, refers to Castilleja as "petitioner's own witness" and states that petitioner called him to the witness stand and then sought to impeach him. Respondent seems to overlook the fact that Castilleja was the State's main witness during petitioner's trial, and was only called to the witness stand by petitioner in the hearing on the application for a writ of habeas corpus; that he was at that time an adverse, hostile, and unfriendly witness, and petitioner, under all rules of evidence, was entitled to impeach him even though he was placed on the witness stand by petitioner.

Respondent in his brief in opposition further states that "The Petitioner was unable to substantiate by any affirmative evidence that perjury had been committed by the witness Castilleja, or that there was any suppression of evidence by the prosecuting authority." Petitioner therefore invites again a close examination of the testimony of Castilleja, both in the trial and in the hearing on the application for a writ of habeas corpus, as well as the testimony of Roy Barrera, Stewart Long, and Harry Van Slycke in the hearing on the application for a writ of habeas corpus.

Petitioner states that evidence regarding the relationship of his wife and Castilleja was relevant and material, and that it was admissible for many reasons, especially to show the state of mind of the petitioner at the time of the homicide. Petitioner makes reference here to the applicable statutes of the State of Texas heretofore set out. Petitioner again states that if Respondent is sincere in his contention that the same was not admissible, and that the jury should not have heard the same because such facts were not known to petitioner at the time of the homicide, then the State of Texas should never, under any circumstances, have invited attention to and gone into the matter while putting on its main case before the State had rested,

and before the petitioner had put on any testimony of any kind or nature whatsoever. An examination of the Statement of Facts in the trial will show clearly that the State of Texas first raised the issue and adduced testimony regarding the relationship of the witness Castilleja and the deceased wife of petitioner. Having been informed by Castilleja before the trial of his true relationship with the deceased, the State of Texas was legally and morally bound, in fairness to the petitioner, to see that the jury was given the true facts. The State of Texas under no circumstances should have permitted the untrue testimony of Castilleja to stand and be received by the jury as true testimony. It was the legal burden and moral duty of the prosecutor, when he heard this testimony, knowing that it was not true, to inform the Court or the petitioner's attorney, or both, of the true facts so that petitioner would have been afforded the kind of fair and impartial trial guaranteed him by the Constitution of the United States of America.

Respondent makes great issue of the fact that petitioner's application for a writ of habeas corpus was denied by the Court of Criminal Appeals of Texas. Respondent ignores the fact that the laws of the State of Texas make no provision for a writ of error *coram nobis*. In view of the foregoing, it can be argued that the Court of Criminal Appeals of Texas denied petitioner's application for a writ of habeas corpus, not because petitioner's application was without merit nor because the allegations set out in his application for a writ of habeas corpus were not supported by the facts adduced in the hearing, but because under the laws of the State of Texas, as they now exist, no provision exists for relief in a situation such as presently confronts petitioner.

In conclusion, petitioner contends that all the above and foregoing amounted to a violation of the due process clause

of the Fourteenth Amendment of the Federal Constitution and cites, in support thereof, the recent case of *Bales* v. *Lainson,* 244 F. 2d 495, wherein the court, among other things, stated as follows:

> "Establishedly, a knowing use of perjured testimony by a state prosecutor, as the means or part of the means of convicting an accused, constitutes, if conviction occurs, a violation of the due process clause of the Fourteenth Amendment against him. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; White v. Ragen, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348."

VI. Conclusion

In view of the foregoing, petitioner respectfully submits that rights guaranteed him under the Fifth and Fourteenth Amendments of the Constitution of the United States have been violated and that the same amounted to a denial of due process of law.

WHEREFORE, petitioner prays that the judgment, verdict, and sentence in Cause No. S-54, 370 in the Criminal District Court No. 2 of Bexar County, Texas, styled *The State of Texas* v. *Alvaro Alcorta,* be set aside and held for naught and that petitioner be granted a new trial in said cause.

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